No. 92-693

Supreme Court, U.S.
FILED
OCT 21 1992
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

WARD G. HALL, SR.,

Petitioner

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEP'T,

Respondent

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it acceptable in judicial proceeding for a pretrial conference to be cancelled in the District Court and replaced by a Report and Recommendation for the purpose of rendering a Summary Judgment?

2. In a judicial proceeding, must not all evidence and issues be considered from plaintiff and defendant alike before granting a summary judgment?

3. Under a municipal government, is discrimination upheld even if it is related to a constitutional permissable state interests when, in the execution of its law, the discrimination is proven to be intended with injury by evidence of a proven conspiracy.

4. Is a person's right to "procedural due process" violated when a Notice from a municipality is out of context with the Ordinance that is under the municipal's charter?

5. Is a person's right to "procedural due process" violated when a Notice from a municipality deprives that person of possible several alternatives that may be granted under charter?

INTERESTED PARTY

JANELLE C. COOK

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OPINIONS IN THIS CASE FROM OTHER COURTS

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Judgment for City of Stuart, Florida against Janelle C. Cook and Ward G. Hall, Sr. Magistrate's Report and Recommendation entered 3-28-91. ORDER ratifying magistrate's Report and Recommendation entered 4-30-91. Judgment Order entered 5-22-91.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Judgment AFFIRMED, PER CURIAM, for City of Stuart, Florida against Janelle C. Cook and Ward G. Hall, Sr. Entered 6-23-92. Mandated 7-15-92.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked on the grounds that a United States Court of Appeals has sanctioned the departure by a lower court from the accepted and usual course of judicial proceeding and call for an exercise of this Court's power of supervision.

The date of entry of Judgment sought for review is 6-23-92.

28 USCS Section 2101 is the statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS IN THIS CASE

I

UNITED STATES CONSTITUTION

AMENDMENT FOURTEEN

SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforde any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II

TITLE 42 U.S.C. SECTION 1983

STATEMENT OF THE CASE AND FACTS

On November 1, 1989, the plaintiffs filed their original complaint against the defendant, seeking to establish and recover damages pursuant to Title 42 USCS 1983 and Amendment Fourteen of the United States Constitution, due to demolition of private property without due process of law. Before the property was demolished the plaintiffs went to the defendant and asked why a condemned sign was posted on the property without first having notified the owner, and the defendant informed them that a letter had been sent to the address on record but returned. The defendant then offered and granted the plaintiffs a building permit to remodel but did not give them a specific list of discrepancies that had to be corrected nor any guideline.

On December 7, 1989, the plaintiffs filed motion for default and default was entered against the defendant. Also on December 7, 1989, the defendant filed a motion to dismiss and motion to quash service of process.

On March 7, 1990, the district court issued an ORDER denying plaintiffs' motion for entry of

judgment upon defendant's default, granting in part and denying in part the defendant's motion to dismiss, dismissing with prejudice the plaintiffs' prayer for punitive damages in Count II of complaint and standing dismissed against the defendant for lack of jurisdiction, and denying defendant's motion to dismiss in all other regards, dismissing the complaint and allowing the plaintiffs' an additional 30 days to serve the defendants and file an amended complaint in conformity with this ORDER.

On March 30, 1990, the plaintiffs filed their amended petition, demanding a trial by jury, seeking to recover compensatory damages, loss profits and emotional stress damages pursuant to title 42 USCS 1983 as a result of their property being destroyed by the defendant without due process of law.

On May 3, 1990, the defendant filed an answer to the amended petition, denying all of the defendant's allegations. The defendant raised three affirmative defenses; that the amended petition failed to state a claim upon which relief could be granted, that the defendant act-

ed in good faith with the belief that its actions were legal and justified, and that it was the plaintiffs who were themselves guilty of negligence which was a proximate cause of their damage.

On July 27, 1990, scheduling conference was held.

On July 31, 1990, the court issued a Scheduling ORDER setting final pretrial conference and non-jury trial.

On November 2, 1990, the defendant filed motion for summary judgment.

On November 29, 1990, the plaintiffs filed their motion to dismiss the defendant's motion for summary judgment.

On December 10, 1990, the defendant filed motion to remove trial from non-jury docket and reset on jury docket.

On December 26, 1990, the court issued an Order striking trial from calendar and cancelling pretrial conference; trial to be reset at later date.

On January 31, 1991, the court issued an Order referring the defendant's motion for summary judgment to magistrate judge for Report and

Recommendation.

On February 13, 1991, the court issued an Order granting the defendant's motion to remove trial from non-jury docket to jury trial docket; denying plaintiffs' motion to compel without prejudice; denying defendant's motion to compel without prejudice; denying as moot plaintiffs' motion to dismiss or quash defendant's motion to compel.

On March 28, 1991, magistrate judge filed the Report and Recommendation recommending the defendant's motion for summary judgment be granted on Count I because there is no showing of a lack of due process, and on Count II because the plaintiffs have not provided any evidence of conspiracy to violate their civil rights or any evidence of racial discrimination.

On April 8, 1991, the plaintiffs filed their response to the magistrate judge's Report and Recommendation. The defendant did not respond to the magistrate judge's Report and Recommendation nor to the plaintiffs' motion to dismiss defendant's motion for summary judgment.

On April 30, 1991, the court issued an Order ratifying the magistrate judge's Report and

Recommendation, granting the defendant's motion for summary judgment.

On May 13, 1991, plaitiffs filed notide of appeal from the order ratifying and affirming the report and recommendation of the magistrate judge. Certified copies of notice of appeal, docket, and order under appeal to USCA: APPEAL BY PLAINTIFFS.

On May 20, 1991, Judgment for defendant against plaintiffs.

On May 22, 1991, Judgment entered against plaintiffs.

On August 6, 1991, the plaintiffs submitted their main brief to the Eleventh Circuit Court of Appeals.

On August 30, 1991, the plaintiffs submitted their reply brief to the Eleventh Circuit Court of Appeals. The plaintiffs also submitted a motion to supplement the record with police and photographic documents.

On September 10, 1991, the Eleventh Circuit Court of Appeals issued an Order that the plaintiffs' motion to supplement the record with police and photographic documents is carried with

the case.

On June 23, 1992, the Eleventh Circuit Court of Appeals AFFIRMED the district court's Opinion. The court further ordered that plaintiffs pay to defendant the costs on appeal.

On July 15, 1992, the The Eleventh Circuit Court of Appeals issued the Judgment as Mandate. This Petition For Writ of Certiorari timely follows.

On November 3, 1988, the plaintiffs went to the defendant to find out why a condemned sign was posted on their property without having notified them. The defendant told the plaintiffs that a letter had been sent to the address on record but had been returned. In that same meeting of November 3, 1988, the defendant told the plaintiffs that he would give them an opportunity to remodel and did grant them a building permit to remodel but no list of discrepancies or specific guidelines. The defendant told the plaintiffs just to make it liveable. The plaintiffs knew nothing about an appeal or demolition of their property if the condemnation went unresolved after a designated time.

On or about September 12, 1989, the plaintiffs' structure at 921 Bayou Avenue in the City of Stuart, Florida was completely demolished by the defendant.

The central core and thrust of this petition involves the information the plaintiffs received from the defendant in the meeting of November 3, 1988, when the building permit was offered and granted, a determination if it were due process, and the reasons the defendant gave for destroying the plaintiffs' property.

Additionally, this petition involves the police reports the defendant gave the plaintiffs and the defendant's proof of service which raised the issues of fraud, a racially motivated conspiracy and double standards of condemnation by race, of which the court did not address when granting the defendant's motion for summary judgment.

ARGUMENT

The United States Court of Appeals For The Eleventh Circuit upheld a summary judgment, per curiam, rendered by District Court in behalf of the defendant, CITY OF STUART, FLORIDA, BUILDING AND ZONING DEPARTMENT ("City"). It its Opinion, the appeals court stated that "after full discovery and the assistance of a magistrate judge, the district court granted summary judgment to the city because the plaintiffs had provided no evidence of a discriminatory city custom or policy and no evidence of a racially motivated conspiracy. We AFFIRM." The court further stated that "the city met its Fed. R. Civ. P. 56 burden of showing that the plaintiffs lacked any evidence in support of their case." Overall, the appeal court stated that the plaintiffs failed to meet the required burden "to demonstrate specific facts that indicated genuine issues for trial," and that the plaintiffs "have not identified any evidence of a discriminatory City Custom or policy, as rerequired to hold a municipality liable for section 1983 violations.

First, the plaintiffs do not believe that they were properly notified of the condemnation of their property. And since it was the plaintiffs who inquired as to why a CONDEMNATION SIGN (not a condemnation notice) was posted on their property without the owners being notified, and since the Development Coordinator took it upon himself to inform the plaintiffs of all that was necessary by offering the plaintiffs a building permit to remodel, if desired, and make the building liveable, it was the failure of the city through its Developmen Coordinator to adequately and meaningfully notify the plaintiffs of the penalty for failure to resolve the condemnation within sixty days.

Central meaning of "procedural due process" is that parties whose rights are to be affected are entitled to be hear and, in order that they may enjoy that right, they must be notified. Parham v. Cortese, 407 U.S. 67, 92 S.Ct 1983, 1994, 32 L Ed 2d 556; Baldwin v. Hale, 1 Wall, 223, 233, 17 L.Ed. 531. See Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914; Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed.

215; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. In their motion for summary judgment, the city contends that whether or not the plaintiffs received a notice of condemnation, they received adequate procedural process because of a building permit that was granted them to remoded and, also, because of a return receipt alleged to have been signed by one of the plaintiffs. The plaintiffs' challenged the city's postal return receipt by producing documents from the alleged delivering postal facility and the 19th Judicial Circuit Court of Florida. The postal documents were a permanent change of address from the address of the alleged delivery at least sixteen months before the city's notice was mailed. The plaintiffs' also produced a MEMO signed by the Supervisor of Clerks at the alleged delivering postal facility, that they had no record of any certified letter being delivered to the plaintiffs nor any number in their records that correspond to the certified number given by the city. The memo also stated that any mail sent to the plaintiff at the alleged time would have been returned

to the sender as UNDELIVERABLE AS ADDRESSED-FORWARD EXPIRED. The court document was an eviction order which also verified the plaintiffs' departure from the address in question at least sixteen months before the city's notice was sent. The plaintiffs believe that these documents were enough to satisfy, in their behalf, their requirements under Fed. R. Civ. P. 56 of demonstrating specific facts that indicated genuine issues for trial.

It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62. There was no condemnation notice posted on the premises of the demolished structure. There was a posted CONDEMNED SIGN which is very limited in information and reads as follows as noted in Stuart Code Article XV, Sec. 6-512:

> "THIS BUILDING IS UNSAFE AND ITS USE OR OCCUPANCY HAS BEEN PROHIBITED BY THE CITY OF STUART."

This sign is not informative as to justify destruction of the Plaintiffs' property.

Fundamental requisite of "due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice. Trinity Episcopal Corp. v. Romney, D.C. N.Y., 387 F.Supp. 1044, 1084. It is evidently clear that the posted sign on the condemned property did make the plaintiffs aware that a matter is pending. This This was their purpose of inquiring of the city. They had not received any written communication by mail nor by hand delivery nor had they been informed verbally when they conferred with the Development Coordinator that they had right to other choices.

The city contends that, prior to demolition, they attempted to contact the plaintiffs by sending them a second condemnation notice but the certified letter was returned. Why was the letter returned? Because the defendant, for the second time, attempted to notify the plaintiffs at an address they knew, after the first instance, they could not receive it. The sec-

ond letter was also returned as the first - UNDELIVERABLE AS ADDRESSED-FORWARD EXPIRED. The plaintiffs entered in evidence a copy of the building permit application they had on file in the city's office showing the current address of the plaintiffs, which was deliverable. The plaintiffs believed that they had met the requirements of Fed. R. Civ. P. 56 in this instance, too, because all the evidence, so far, challenged the grounds for which the city sought a summary judgment. And all the evidence proved factual.

In their motion for summary judgment the City of Stuart contends that its government policy is racially neutral on its face and if there is any discrimination, it is administration and, if tested, will be upheld because " it is rationally related to a constitutional permissable state interests." See Washington v. Davis, 426 US 229 (1976). (City Of Stuart, FL Motion For Summary, Section V EQUAL PROTECTION). The city claims it passed the test because its discriminating administration was necessary to promote a compelling government interest when it destroyed

the plaintiffs' property and that the "demolition was nothing more than a justified use of police force to accomplish a constitutional state interest."

The first flaw in this particular ground that the city challenged the plaintiffs when it (the city) motioned for a summary judgment, showed up in a single, only existing, police report on 921 Bayou Avenue, the address of the plaintiffs' demolished property.which the plaintiffs also entered as an exhibit of evidence. The city wrote in its motion for summary judgment under Section V EQUAL PROTECTION, "The destruction of the plaintiffs' structure was necessary to protect the community from the hazards that the property was creating. From 3-24-88 to 9-7-89 there were eleven reported incidents, ranging from grand theft auto to battery, at the address of the plaintiffs' property." The plaintiffs produced the only police report on 921 Bayou Avenue and it had to do with a request by the Florida Power & Light Co. requesting a police standby while the service line extending from the house to the pole was

disconnected.

The plaintiffs challenged the city's reported eleven incidents which city alleged was ground for destroying plaintiffs' property, implying that these alleged incidents at the premises caused the property to be a threat to the community's safety health and general welfare. The city, if it had police reports to substantiate its allegations, did not enter such proof with its motion for summary judgment. The Appeals Court AFFIRMED the District Court's findings that the plaintiffs failed to meet their Fed. R. Civ. P. 56 burden.

The next flaw in the city's claim that the destruction of the plaintiffs' structure was "nothing more than a justified use of police force to accomplish a constitutional state interest," manifested when the city finally gave to the plaintiffs' ten police reports containing the alleged eleven incidents related to 921 Bayou Avenue, the address of the plaintiffs' demolished property. Not one of the ten reports contained the address of 921 Bayou Avenue. All the reports were addressed either to 922 or 924

Bayou Avenue, which are good addresses and are situated across the street from the plaintiffs' property of 921. The Police officers who made the reports could not all have made the same mistake when the plaintiffs' structure was mark- across the front with metallic numbers about three inches high and anchored across the front of the structure. What proves that there was a conspiracy between the city and the police department is that (1) all of the dates of incidents and the complaints on the reports match the complaints and dates alleged to the plaintiffs' property and (2) all of the seven police officers, Barbre, Jensen, Logalbo, Walter, Nolan, Ashley and Swartz, whose names appear on the city's witness and exhibit list also appear on the ten police reports containing the eleven reported incidents alleged to have been commited at the structure of the plaintiffs' demolished property.

The Supreme Court wrote, "Any person who under color of any law, statue, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person...

...to the deprivation of any rights, privileges, or immumities secured by the Constitution of the United States, shall any such law, statue, ordinance, regulation, custom, or usage, the State to the contrary not-with-standing, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.. ....it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983. See Monell v. Dep't of Social Servs., 438 U.S. 658, 691-692, 694, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978). The City of Stuart, Florida, in its execution of a government policy, inflicted the injury to the plaintiffs when it destroyed their property as a result of the city's own failure to render procedural due process to the plaintiffs. All seven police officers who conspired with the city are well known in the black community and have been involved in racial riots between white police officers and black citizens in the community.

State can, consistently with Fourteenth Amendment, provide for differences so long as result does not amount to denial of due process or invidous discrimination. Douglas v. California, (1963) 372 U.S. 353, 9 L.Ed. 2d 811, 83 S.Ct. 814, reh den 373 U.S. 905, 10 L.Ed. 2d 200, 83 S.Ct. 1288. Under 42 U.S.C.S. Section 1983, if a single act by a municipality is offensive and outrageously bad, the municipality becomes liable. See Willhauk v. Halpin, 1984, (D.C. Mass) 599 F.Supp. 282; Turpin v. Mailet, 619 F.2d 196 (1980).

In the Plaintiffs' Motion To Dismiss the Defendant's Motion For Summary Judgment, it is apparent that none of the evidence of the plaintiffs was considered in granting the city's motion for summary judgment.

The plaintiffs contend that the City of Stuart, Florida's CONDEMNATION NOTICE violates the equal protection clause of Amendment Fourteen of the United States Constitution because its wording is out of context with that of the City's Ordinance.

> "If after (60) sixty days this condemnation has not been re-

> solved, the City of Stuart <u>will</u> demolish the building and assess all expenses as lien against the property."

The notice leaves the door open for racial discrimination in condeming property to the point of demolition in the black community of City of Stuart as compared to allowing structures of unresolved condemnations remain in the white community.

The City of Stuart Ordinance on condemnation under <u>Stuart Code Article XV, Sec. 6-515</u>, reads:

> "upon receipt of a report by the fire chief or building official as required by section 6-514, together with a <u>written</u> statement of reasons for the giving of such notice, the <u>city manager</u> shall determine if the building should be <u>demolished</u>, <u>secured</u> or <u>remain vacant</u>, and shall take the necessary steps to enforce his decision."

In support thereof, the plaintiffs submitted the condemnation file on WOODMAN HALL a condemned structure owned by members of the white race and located in the City of Stuart in Potsdam which is an all white subdivision. This was filed with the Plaintiff's motion to dismiss defendant's motion for summary judgment and is

an example of facial discrimination by race in the City of Stuart by the example it enforces certain ordinances among blacks in the community as compared to in the white community. The blacks are governed by the CONDEMNED NOTICE., Non-Compliance results in demolition of structure. Four homes have been demolished, so far in the black community. The condemned structure of Woodman Hall still stands. That is what the photographs are all about which were not allowed to be entered at the appellate level. The whites are governed by the entire context of Stuart Code Article XV, Section 6-515, which means that the decision is always that the buildings remain standing even when there is non-compliance , in the white community. Thus the city's Condemnation Notice is unconstitutional.

CONCLUSION

The Judgment in this case should be reversed because of the City of Stuart, Florida conspiring with its police department and using fabricated evidence against the plain-

tiffs under the color of State and depriving the plaintiffs of their rightful protection under Amendment Fourteen, Section 1, of the United States Constitution.

Respectfully submitted,

Ward G. Hall, Sr.

WARD G. HALL, SR.

APPENDIX

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CERTIFICATE OF SERVICE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3426
Non-Argument Calendar

D. C. Docket No. 89-14174-CIV-JAG

JANELLE C. COOK,
WARD G. HALL

Plaintiffs-Appellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPT.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 23, 1992)

Before EDMONDSON, COX and BIRCH, Circuit Judge.

PER CURIAM:

In this appeal, the plaintiffs challenge the district court's grant of summary judgment in favor of defendant City of Stuart, Florida, Building and Zoning Department ("City"). In their complaint, the plaintiffs alleged that the City violated 42 U.S.C. Section 1983 (1988) by discriminating against them on the basis of their race. Count one of the complaint alleged that the City engaged in racial discrimination when it purportedly destroyed the plaintiffs' building without proper notice. Count two contended that unnamed City conspirators engaged in a racially motivated plan to deprive the plaintiffs of their property rights. After full discovery and the assistance of a magistrate judge, the district court granted summary judgment to the City because the plaintiffs had provided no evidence of a racially motivated conspiracy. We AFFIRM.

The City clearly met its Fed. R. Civ. P.56 burden of showing that the plaintiffs lacked any evidence in support of their case. Upon this showing, the plaintiffs were required to

demonstrate specific facts that indicated genuine issues for trial. Celotex Corp. v. Catrett 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986; Eberhardt v. Waters, 901 F. 2d 1578, 1580 (11th Cir. 1990). The plaintiffs failed to meet this burden. The plaintiffs have not identified any evidence of a discriminatory City custom or policy, as required to hold a municipality liable for section 1983 violations. See Monell v. Dep't of Social Servs. 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978). Indeed, the plaintiffs' amended complaint does not even allege that such customs or policies exist. Nor have the plaintiffs designated any evidence in support of their claim that there was a racially motivated City conspiracy. The plaintiffs' reliance upon bare allegations and unsubstantiated rhetoric is insufficient at the summary judgment stage. See Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986).

The plaintiffs have entirely failed to identify any evidence in the record that would indicate genuine issues for trial. Because the

plaintiffs had no facts suggesting that they were treated differently than other, similarly-situated property owners in the City, the district court correctly ruled that the City was entitled to judgment as a matter of law.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5426

Non-Argument Calendar

D. C. Docket No. 89-14174-CIV-JAG

JANELLE C. COOK,

WARD G. HALL,

Plaintiffs-Apellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEOP.,

Defendant-Appellee.

Appeal from the United States District Court

for the Southern District of Florida

Before EDMONDSON, COX and BIRCH, Circuit Judges

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this

cause be and the same is hereby AFFIRMED:

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 23, 1992

For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: July 15, 1992

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. - CASE NO. 89-14174

CITY OF STUART, FLORIDA CIV-GONZALEZ

BUILDING AND ZONING DEPARTMENT,

Defendant.

ORDER OF REFERRAL TO UNITED STATES MAGISTRATE

THIS CAUSE has come before the Court upon the defendant's motion for summary judgment.

The Court has reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that pursuant to 28 U.S.C. Sec. 636(b)(1)(B) the defendant's motion is referred to United States Magistrate Judge Lurana S. Snow for further proceedings, including report and recommendation concerning the disposition of the motion.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 31st day of January, 1991.

JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-14174-CIV-GONZALEZ

JANELLE C. COOK, et al.

Plaintiffs,

vs.

CITY OF STUART, BUILDING
AND ZONING DEPARTMENT,

Defendant.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the defendant's motion for summary judgment and was referred to United States Magistrate Judge Lurana S. Snow, for report and recommendation.

PROCDDURAL HISTORY

The pro se civil rights complaint against the City of Stuart, Florida Building and Zoning Department was filed November 1, 1089 (Docket Entry 1). After dismissal of the complaint for lack of proper service (Docket Entry 7), an amended complaint was filed March 30, 1990, 1990 (Docket Entry 8). The answer was filed May 3, 1990 (Docket Entry 11).

The defendant filed the motion for summary

judgment on November 2, 1990 (Docket Entry 28); the plaintiffs' response was filed November 29, 1990 (Docket Entry 30).

FACTS ALLEGED

The amended complaint (hereinafter "complaint") alleges that on September 12, 1989, the defendant entered onto private property, demolished the building situated thereon and cleared the land without notice to the plaintiffs, who own the property. The plaintiffs state they received no written or verbal notice that the property was being condemned before a condemnation notice was posted on the property. The plaintiffs saw the notice on November 3, 1988, and immediately met with a code enforcement officer, O'Neil, to discuss the condemnation. The complaint alleges O'Neil stated that he had mailed a notice but it had been returned as undelivered. The plaintiffs supplied an updated address.

At the meeting, they explained that the property was a subject of a lawsuit in the state court, but the plaintiffs would repair the structure to conform to the relevant codes.

O'Neil agreed to permit the repairs and suggested the plaintiffs keep the condemnation posted on the property to help prevent trespassing.

The repairs were begun, but the house was subsequently demolished without notice to the plaintiffs. the mortgage holder, or the Hedge Highway Evangelistic Association, Inc. (hereinafter "the Association," the owner of record of the property.)

Count I asserts a violation of the plaintiffs' civil rights pursuant to 42 U.S.C. Sec. 1983, owing to the destruction of the property without proper notice.

Count II alleges violation of the plaintiffs' civil rights pursuant to 42 U.S.C. Sec. 1983, owing to a racially motivated conspiracy to effect the malicious or negligent destruction of a boarding house.

The plaintiffs request compensatory damages and damages for emotional distress.

MOTION FOR SUMMARY JUDGMENT

The defendant's motion for summary judgment contends that the plaintiffs have no standing to file a lawsuit regarding the property; that they

have named an improper defendant; that property rights involving pecuniary loss cannot form the basis for a civil rights action; that the matter is not ripe for federal review because the plaintiffs have failed to exhaust their state law remedies; that there is no showing that the incident was the result of established municipal policy or custom; that the necessary due process was afforded the plaintiffs, and that there is no evidence of racial discrimination.

In support of these arguments, the defendant filed O'Neil's deposition and several exhibits.

During the deposition, O'Neil stated that when he first saw the premises, the doors were open, the plumbing had been vandalized, the wiring was faulty, windows were broken, and part of the floor was missing (p. 37). Although he was in the neighborhood to inspect another property, the condition of the plaintiffs' property mandated an inspection (pp. 36-37).

O'Neil testified that a notice of condemnation had been mailed to the Association; O'Neil received a signed return receipt dated November

4, 1988 (p. 7); see also Exhibit 1). O'Neil did not know what record had provided the address to which the notice was mailed (2239 Flamingo Terrace, Jensen Beach, FL 33457) (p.16, and defendant's Exhibit 1).

O'Neil testified that the City regulations did not require separate notice of demolition and that the plaintiffs had notice of the condemnation when they came to his office on October 3, 1988 (p. 31).

O'Neil also testified that a title search had been made prior to the demolition of the building but he was not aware of a mortgage holder. O'Neil believed that notice of the demolition was mailed on May 24, 1989, to the owner listed on the tax roll and also was inserted in the newspaper, but he did not personally do either, and had no record of those notices (pp. 11-12). He remembered that the mailed notice of demolition was returned undelivered (p.31).

There was no attempt made to obtain the address of the Association from the Secretary of State (p.15). Defendat's Exhibit III is an affidavit from a title search company stating that

the property was deeded to the Association by a quitclaim deed filed February 19, 1985.

O'Neil stated that during the November 3, 1988, meeting the plaintiffs submitted an application for a building permit for repairs to the property (p.34). The permit was issued the same day (p. 35) in the name of the Association, although the plaintiffs requested a permit in the name of plaintiff Cook, a bishop in the church (p. 34). The address of the Association listed on the permit was 5755 Southeast Green Lane, Stuart, Florida (p.35).

The building permit had a time limit of six months if there was no active work performed, and was valid for the length of construction if the work was ongoing (p. 19). Prior to the September 1989 demolition, O'Neil observed that the doors again were open, the plumbing disconnected, the flooring removed, and the wiring unchanged. Bars had been added to some of the windows, but the building contained clothing, trash and food debris (p. 41).

The demolition decision was made by O'Neil and another employee of the Building Department,

Mr. Kearney. A second notice of condemnation was posted on the property prior to the demolition (p. 45).

Exhibit I is a copy of a condemnation notice for the subject property, dated November 1, 1988, which lists the owner as the Association, with a Jensen Beach address. The notice is a form which lists various deficiencies; all are checked off for this property:

> Property unsecured and readily available to trespassers.
>
> Plumbing and plumbing fixtures, including bathroom facilities, sinks and running water.
>
> Electricity and electrical fixtures.
>
> Heat and ventilation.
>
> Rodent-proofing and water-tightness.
>
> Foundations.
>
> Walls, windows.
>
> Doors and door frames.
>
> Roof
>
> Stairways and porches.

The notice also states that the owner has 30 days to obtain a building permit and begin renovation, or may appeal the condemnation within 10 days. If the condemnation is not resolved

in 60 days, the City of Stuart will demolish the building and assess the expense as a lien against the property. The notice is signed by O'Neil.

Exhibit II is the City Manager's affidavit stating that the City of Stuart is the only entity capable of being sued, there is no separate entity known as the City of Stuart, Florida, Building and Code Enforcement. The affidavit also states that condemnations are performed in accord with the City's ordinances; there is no custom or policy to the contrary which allows condemnation without notice or for racially discriminatory reasons.

The Stuart City Charter Sec. 11 states that the City of Stuart is governed as provided in the charter; the governing body is the City Commission (Exhibit IV).

Exhibit V is a copy of Article XV of the Stuart Code governing unsafe buildings. Section 6-512 requires delivery of written notice of an un safe building to the owner and the tenant or other person in possession, the mortgagee and other persons or entities having an interest in

the property. Their addresses shall be obtained from the latest tax records; a title certificate also shall be ordered. If these individuals cannot be found on the premises after reasonable search or inquiry, notice of the unsafe building may be posted on the property and also ;ublished in the newspaper as provided. The motice must also inform the owner of the right to appeal.

Section 6-514 provides that 60 days after the notice is posted or served, if there is no appeal and if the owner has failed to take such steps as to render the building no longer unsafe, the building official shall make such report to the City Manager. Thereafter the City Manager decides if the building should be demolished, remain vacant or be secured, and takes steps to enforce the decision. Section 6-515. (The Court notes that there is no requirement that the City Manager provides any notice to owners or others of his decision.) The total costs of the demolition and the steps leading thereto are then assessed as a lien against the property. Section 6-516.

Exhibit VI is an affidavit from City Commissioner Christie, which states that the City Commission has enacted ordinances regarding the condemnation of unsafe and unsecured property. there is no policy or custom allowing condemnation of property without notice to the legal owners; in no instance has that occurred. Additionally, condemnations are not instituted based on race and no such policy or custom has been authorized. Christie stated that as a black member of the City Commission he is particularly sensitive to the needs of black constituents.

Exhibits VII through X are the affidavits of City Commissioners Jefferson, Krauskopf - who is also Mayor, Arnold and Walson. These affidavits repeat Christie's statements that condemnations are not instituted without notice or on the basis of race; the City Code governs and there is no policy or custom to the contrary.

The plaintiffs responded to the motion for summary judgment with a number of exhibits. In support of their naming the City of Stuart

Building and Code Enforcement Board as the defendant, the plaintiffs supply a copy of the City of Stuart, Building and Code Enforcement listing in the telephone book (Docket Entry 30, Exhibit B).

In support of their standing as plaintiffs, they provided a copy of plaintiff Cook's December 1985 final judgment of dissolution of marriage which voided the February 18, 1985, quitclaim to the Association and awarded Cook exclusive possession of the property (Exhibit C, p. 4, paras. 4 and 6(d).

The plaintiffs also provided a February11, 1985 , mortgage deed on the property in favor of plaintiff Hall signed by plaintiff Cook (Exhibit D). The incorporated interes-free note is repayable as a lump sum on December 31, 1993 and is secured by the mortgage. The mortgage gives the mortgagee power to foreclose on the property if the underlying note or any other sum related to the property, such as taxes, is not paid. The mortgage bears a State of Florida documentary stamp dated February 12, 1985, and is recorded in the Martin County records in

Book 627, pages 691-94. This mortgage was also voided by the final judgment of divorce (Exhibit C, p. 4, para. 3).

However, Florida's Fourth District Court of Appeal ruled that Cook's ex-husband had no standing to ask the circuit court to void the quitclaim deed and the mortgage deed, and specifically found that the trial court could not affect the Association's title or Hall's mortgage since meither the Association nor Hall was a party to the divorce proceedings. On October 9, 1987, the court of appeal reversed those sections of the final judgment (Exhibit E).

Regarding the matter of notice, the plaintiffs offered a November 11, 1990, statement from the Jensen Beach Post Office: "There is no record on file @ the Jensen Beach Post Office of article #P659683669 Being Received - Regular Forward had expired @ 2239 SE Flamingo Terrace Undeliverable as addressed /s/ KR Flaum Sr." (Exhibit F). On July 31, 1987, Hall Applied for a Post Office box in Jensen Beach (Exhibit G), after the property at 2239 Southeast Fla-

mingo Terrace was seized by the Sheriff on a writ of Possession (Exhibit H).

A 1989 proposed tax bill for the subject property shows the owner as Hedge Highway Evangelistic Association, 5755 SE Green Lane, Stuart, FL 34997 (Exhibits J, J-1). The November 3, 1988, application for a building permit lists the owner as the Association. 5755 SE Green Lane, Stuart, FL 34997, signed by Bishop Hall for the Association (Exhibit K). The permit states that permit applications for proposed work shall be considered abandoned six months after the date of filing. Exhibit L is a July 1989 letter from the Florida Department of State which states that the Association, at the Stuart Address, has certificate of status number 730690.

A computer print out from the Stuart Police shows a call to the premises August 31, 1989 at 1312 hours (Exhibit M).

A receipt dated April 1, 1988, indicates that Mrs. Cook paid a painting contractor $555 to clean four properties, including the subject property (Exhibit Q). Eight window grates

were paid for on November 10, 1988 (Exhibit R).

Exhibit I is a copy of a hand-dated sender's portion of a certified mail number allegedly attached to a notice of condemnation sent to the owners of another property in Stuart, the Woodman Hall Building. The plaintiffs contend that since there is no return receipt on file for this condemnation notice, there is a policy of not mailing notices. They assert that the signed return receipt on file for their property is suspicious. Additionally, the memorandum of law alleges that the Woodman Hall Building had not been demolisned as of November 1990, even though the condemnation notice is dated July 10, 1989. They argue that the rapid demolition of their property was obviously racially motivated.

Plaintiff Cook's affidavit (Exhibit S) states that she is the owner of the subject property by virtue of the December 1985 final judgment of dissolution of marriage and the reversal of the judgment by the Fourth District Court of Appeal. The property first belonged to her late father. Cook avers she holds one

of two interests in the property.

The affidavit states that Cook was present at the November 3, 1988, meeting with plaintiff hall and O'Neil. At that meeting O'Neil did not provide any written guidelines for making the building conform to the code, did not show them the condemnation notice, did not tell them of the right to appeal, and did not mention demolition. Cook also avers that O'Neil stated that the mailed notice of November 1988 had been returned undelivered.

The affidavit continues that O'Neil refused to accept Cook's assertion that the property belonged to her and that she intended to change the deed to show the property was no longer owned by the Association. O'Neil insisted that the permit be issued to the Association to expedite matters, since the notice of condemnation was issued in that name. O'Neil also stated that the building was structurally sound.

Cook states that plaintiff Hall moved from Jensen Beach in July 1987.

Plaintiff Hall's affidavit (Exhibit T) states he is the mortgagee of the property and

one of the two parties of interest in this action. Hall, as Bishop of the Association, states that the property no longer belongs to the Association by virtue of the December 1985 final judgment of dissolution of marriage.

Hall avers that at the November 3, 1988, meeting with O'Neil, the plaintiffs told O'Neil the deed to the property would be changed once the divorce litigation was over. However, O'Neil insisted on issuing the building permit in the Association's name since that name was on the notice of condemnation. O'Neil also suggested that the "condemned" sign remain posted on the property to discourage trespassing.

The affidavit states that O'Neil never gave the plaintiffs any condemnation notice during the meeting, did not offer any written guidelines for the repairs, did not inform the plaintiffs of the appeal process, or give notice of the September 1989 demolition. However, O'Neil did state that the building was structurally strong, would not take much work to meet the code, and would help ease the housing shortage in east Stuart.

Hall continues by stating that he changed the Jensen Beach address for the Association in July 1987; mail sent to that address after July 1988 would have been returned undelivered.

Hall has never been shown the actual return receipt card, in spite of requests to produce it (Exhibits N and O). The copy he was shown at O'Neil's deposition had several numbers cut off at the edge of the paper and is not the copy attached to the defendant's motion for summary judgment.

Finally, Hall states that he has photographs of properties belonging to others in Stuart, such as Woodman Hall, which demonstrate that the plaintiffs are victims of racial discrimination.

RECOMMENDATIONS OF LAW

Title 42 U.S.C. S.1983 establishes the right of a person to pursue a civil action based on deprivation of federally protected rights. The two essential elements to a S1983 action are: (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct must have depri-

ved a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). The evidence must be viewed in the light most favorable to the nonmoving party. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

1. Capacity To Be Sued

The defendant contends that the only proper defendant to this action is the City of Stuart, a municipal corporation, which has not been named as a defendant. The named defendant City of Stuart, Florida Building and Code Enforcement, claims it is not an entity capable of being sued.

Pursuant to Rule 17(b), Fed.R.Civ.P., the capacity of a coporate entity to be sued is determined by state law. In Florida a muncipal corporation's capacity to sue and be sued is governed by the Municipal Home Rule Powers Act, which provides municipalities with "the broad exercise of home rule powers granted by the constitution." Fla.Stat. S166.021. The Florida Constitution permits the exercise of "any power for municipal purposes except as otherwise provided by law." Fla.Constitution, Art. 8, S2(b).

Florida courts interpret this grant to mean that "(a)utonomous bodies of government have the power to either bring suit or be sued." Miami v. Rodriquez-Quesada court found that non-autonomous city boards did not have the capacity to sue or be sued.

The defendant provided the affidavit of the City Manager which avers that the only governmental entity is the City of Stuart; there is no separate entity known as the City of Stuart, Florida building and Code Enforcement. All building and code enforcement functions are performed by City of Stuart employees.

The plaintiffs provided the telephone listing for City of Stuart, Code Enforcement Board. However, a telephone directory listing does not define or affect the governmental entity properly created pursuant to Florida statues. The listing clearly is meant to help citizens direct their inquiries to the proper city employee.

The evidence is unrefuted that the only proper defendant is the City of Stuart.

However, prior to the motion for summary judgment, the defendant filed a motion to quash service, an answer, witness lists and various motions in the name of the City of Stuart Code Enforcement Board. Neither of the first two pleadings assert that the complaint or the amended complaint names a defendant which lacks the capacity to be sued. The argument does not arise from evidence obtained during discovery; it is now asserted a year after the action was initiated, after a trial date has been set.

Rule 9(a), Fed.R.Civ.P., requires a party wishing to raise the defense of the capacity of an entity to be sued shall file "a specific neg-

ative averment." The Court must consider whether the defense of lack of capacity is waived if not asserted at the outset of the lawsuit. This analysis requires a determination of the nature of the defense according to state law, and then ascertaining when it must be raised under the Federal Rules of Civil Procedure. Morgan Guaranty Trust Co. v. Blum, 649 F.2d 342, 345 (5th Cir. 1981)(the Eleventh Circuit adopted as precedent the rulings of the Fifth Circuit decided prior to September 30, 1981. Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981)).

Fla.R.Civ.P. 1.120(a) also provides that the defense of lack of capacity to be sued must be made by specific negative averment. In Florida Courts, the defense must be raised in the answer or a motion to dismiss. Keehn v. Joseph C. Mackey & Co., 420 So.2d 398, 399, n. 1 (Fla. 4th DCA 1982), citing Whittington Condominium Apts. Inc. v. Braemar Corp., 313 So.2d 463 (Fla. 4th DCA 1975).

Federal Rule 9(a) requires the same procedure. In this Circuit, lack of capacity to be sued may be waived if not appropriately raised

in a responsive pleading. Morgan, supra, 649 F.2d at 345, citing 5 Wright and Miller, Federal Practice and Procedure, S1295 (1965).

Accordingly, the Court should deny the defendant's motion for summary judgment based on lack of capacity to be sued.

2. Real Parties In Interest

The defendant contends only the owner of record for real property can file a lawsuit regarding the destruction of that property. The October 16, 1990, affidavit from the Palm Beach title services states that the owner of record of the property is the Hedge highway Evangelistic Association , Inc. The affidavit does not mention any recorded mortgage.

Plaintiff Cook claims to be the owner of the property and plaintiff Hall claims to be the mortgagee of the property.

The owner of property has standing to file a lawsuit in federal court. Walker v. United States, 428 F.2d 1229, 1233 (C. Cl. 1970). The plaintiffs' exhibits show that on February 18, 1985, plaintiff Cook conveyed the property by quitclaim deed to the Association. The quit-

claim deed was voided by the final judgment of divorce issued December 10, 1985, and plaintiff Cook was awarded exclusive possession of that property. On October 9, 1987, the Fourth District Court of Appeals reversed the judgment insofar as it set aside the quitclaim deed. The quitclaim deed was restored to full effect; the property reverted to ownership by the Association. The plaintiffs' and defendant's evidence shows Cook has no individual ownership interest in the property.

The Court notes that Cook is a Bishop in the Association, but nothing in the complaint or exhibits suggests that Cook is suing on behalf of the Association. Moreover, the current complaint is filed pro se; the Association must be represented by an attorney in district court. Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985), cert. denied, 474 U.S. 1058 (1986).

Accordingly, Cook has no interest in the property, either as an individual owner or as an agent of the corporation, and cannot be a plaintiff in this action.

Next, the Court will consider Hall's stand-

ing. A mortgagee has an interest in real property and may file a lawsuit to recover damages for destructio of the property. Allstate Finance Corp. v. Zimmerman, 272 F.2d 323, 325 (5th Cir. 1959)., citing Atlantic Coast Line Railway Co. v. Rutledge, 165 So. 563 (Fla. 1935).

On February 11, 1985, before the property was quitclaimed to the Association, Cook signed a note and mortgage on the property which named Hall as the mortgagee. The mortgagee was recorded in the record books of Martin County on February 12, 1985. Although the final judgment of divorce voided the mortgage, the court of appeal reversed that part of the judgment, thereby reinstating the mortgage. The defendant provided no evidence challenging the recorded mortgage.

Because Hall, as mortgagee, has a legally enforceable interest in the property, the Court should not grant the defendant's motion for summary judgment based upon lack of a real party interest.

1. No Showing Of Municipal Custom or Policy

Municipal liability can be asserted if the

plaintiffs' demonstrate that the injury was caused by the official custom or practice of the municipality. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). An isolated improper act by a municipal employee does not demonstrate municipal custom or policy as required by Monell unless the single act is the product of an existing unconstitutional policy. Oklahoma City v. Tuttle, 471 U.S. 808, 823-24, 105 S.Ct 2427, 2436(1985).

Municipal policy may be crrated by the act of the legislative body, by widespread practice so permanent and well-settled as to constitute a custom, or by an official with the authority to make a final decision for the municipality. Bannum v. Fort Lauderdale, 901 F.2s 989 (11th Cir. 1990).

The amended complaint does not allege a custom or policy of destruction of property without notice or for racial motives. Although the amended complaint contains a conclusory allegation of conspiracy, mere use of the word does not show policy or custom.

The defendant has provided a copy of the

Stuart Code which states that condemnation may proceed only with notice to certain individuals or the posting of notice on the property. The factors to be considered in condemnation are listed in the regulations; the race of the owner is not among them. The affidavits of the City Commission members and the City Manager state that condemnation is performed in accordance with the regulations; no other policy or custom is in effect. Property is not condemned without notice or for racial reasons.

O'Neil's deposition states that he issued the condemnation notice based on the condition of the structure. The deficiencies were listed on the condemnation notice. He avers that the plaintiffs had actual notice of the condemnation, since the sign posted on the property caused them to come to his office, where he showed them another copy of the notice and discussed the application for the building permit with them.

O'Neil also testified that in September 1989, few repairs had been made and demolition was scheduled. Notice of demolition is not re-

quired by the City code, but notice may have been sent to the owner of record, the Association.

The plaintiffs offer their affidavits which state that they have pnotographs of Woodman Hall Building and other proofs which demonstrate that the plaintiffs were the victims of racial discrimination. No photographs and no other proofs were submitted to the Court.

There is no issue of material fact regarding this issue; the plaintiffs have failed to allege facts or to provide evidence of a municipal policy of condemnation and demolition of property without notice and for racial motives. The defendant's motion for summary judgment should be granted since there is no showing that unconstitutional municipal policy caused the damage to the property.

4. Applicability of S1983 To Pecuniary Claims

Count I alleges the taking of property without due process. The defendant contends that no property loss capable of measurement in monetary terms can form the basis for a civil rights action. However, civil rights law relat-

ed to property rights is more comples than the defendant suggests in its memorandum.

A complaint which alleges the taking of property associated with realty without notice pursuant to established governmental procedures may state a civil rights violation even if there is a post-deprivation state law remedy. Evers v. Custer, 745 F.2d 1196, 1202, n. 6 (9th Cir. 1984). Established procedures may be found in city codes or in the decisions of the official with final authority in such matters. Burtnicks v. New York, 716 F.2d 982, 988 (2d Cir. 1983).

The defendant also contends that even if the plaintiffs may have a claim under the civil rights statue, the matter is not ripe for federal review because the plaintiffs failed to exhaust their state remedies when they chose not to appeal the original condemnation in October 1988. The defendant cites Doody v. Tudor, 864 F.2d 1475 (9th Cir. 1989).

The Doody court, in an amended opinion, held that while a Fifth Amendment claim for taking of property without just compensation required exhaustion of state law remedies, a

Fourteenth Amendment claim of taking property without due process was not similarly barred once the governmental entity had made a final decision to take the property. Sinaloa Lake Owners Ass'n v Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989). Accordingly, the Court should deny the defendant's motion for summary judgment on Count I for failure to state a civil rights claim ripe for federal review.

5.. Due Process

The due process required before private property can be demolished depends on the surrounding facts. The owner must have an opportunity to be heard before the destruction of property unless there is a strong governmental interest which mandates immediate action, such as an imminent, serious threat to public safety. Burtnicks, supra, 716 F.2d at 987; Lakeland v Bunch, 293 So. 2d 66 (Fla. 1974).

The defendant contends the plaintiffs received all the due process required by the Stuart Code, including notice and an opportunity to be heard. The notide was provided first by certified mail as evidenced by the signed return re-

ceipt and second by the November 3, 1988, meeting between the plaintiffs and O'Neil.

There is no issue of material fact that the plaintiffs had actual notice the property was condemned, even if they did not receive the mailed notice.

The Stuart Code provides two alternatives to the owner of condemned property who wishes to avoid demolition, either an appeal or an application for a building permit for necessary repairs. The plaintiffs applied for and received a building permit.

The Constitution does not require a building permit to extend indefinitely, particularly when the permit states that if work is abandoned for six months, the permit will expire. Spence v. Zimmerman, 873 F. 2d 256, 260-61 (11th Cir. 1989). The instant building permit was issued October 3, 1988, and contained a six-month expiration warning. The plaintiffs' unrebutted evidence shows that nothing was done to the property after the window bars were installed in November 1988, even though the property was still unsafe.

Although the plaintiffs obtained a building permit, they aver that they were never told of the right to appeal or the possibility of demolition; they contend they were deprived of due process.

Due process requires notice and a meaningful hearing. Sinaloa Lake Owners Ass'n., supra, 882 F.2d at 1405. The plaintiffs make no claim of special disability such as lack of fluency in English. Considering all the evidence before the Court, there is no issue of material fact that the plaintiffs had notice of the condemnation, conferred with the Building Department, and received a time-limited permit for repairs. Based on the last documented repair, the permit lapsed in May 1989, with the building still unsafe. The demolition occurred in September 1989.

There also is no issue of material fact that the building had multiple code defects when condemned and when demolished. The plaintiffs do not claim that the building had no code violations and was improperly condemned.

Their only argument is that O'Neil did not

warn them or notify them of the demolition. Separate notice of the demolition is not required by the Stuart Code, since demolition is only one step of the condemnation process. Clearly the plaintiffs had notice of that process, a chance to be heard and an opportunity to correct the code violations. The plaintiffs received all the due notice required by the Stuart Code and by the Constitution.

Therefore the Court should grant the defendant's motion for summary judgment on Count I because there is no showing of a lack of due process.

6. Racial Discrimination

Count II of the amended complaint alleges a racially-motivated conspiracy to destroy the property. At the summary judgment stage, the plaintiffs cannot rely on the bare allegations of conspiracy, but must provide evidence to support the claim. Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986). "To establish a prima facie case of conspiracy to violate rights protected by S1983, a plaintiff must demonstrate that the defendants 'reached an understanding to violate (his) rights.'" Strength v. Hubert

854 F.2d 421, 425 (11th Cir. 1988)(citations omitted), reh. den., 860 F.2d 1092 (1988)

Nothing in the complaint or in the plaintiffs' response to the motion for summary judgment identifies the alleged co-conspirators or shows any evidence of express or implied agreement to violate the plaintiffs' civil rights.

However, discriminatory acts may be performed in the absence of a conspiracy. Racial discrimination may be based on laws that are discriminatory on their face or are enforced in a discriminatory manner. Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944). It is undisputed that the condemnation regulation is not discriminatory on its face.

"The equal protection clause 'is essentially a direction that persons similarly situated should be treated alike.'" Spence, supra, 873 F.2d at 261 (citations omitted). During summary judgment, the plaintiffs must offer evidence that others similarly situated were treated more favorably.

The plaintiffs' evidence of the treatment afforded other owners of condemned property con-

sists of (1) a receipt for certified mail to an addressee in Whitestone, New York; (2) a copy of the notice of condemnation sent to that same address regarding the Stuart property known as the Woodman Hall Building, showing code violations in six of the ten categories, and (3) Hall's affidavit stating he has photographs of the Woodman Hall building which demonstrate that the plaintiffs are the victims of discrimination. The condemnation notice for the Woodman Hall building was prepared July 10, 1989; during O'Neil's deposition on August 1, 1990, Hall suggests the building was still standing. The memorandum of law alleges the building was still standing in November 1990, but there is no evidence of this.

Nothing in this evidence indicates the race of the owners of the Woodman Hall Building, or that the buildings were similarly situated with respect to the building code violations or what efforts were made to remedy those violations. The plaintiffs have failed to show discriminatory treatment.

Accordingly the Court should grant the de-

fendant's motion for summary judgment on Count II because the plaintiffs have not provided any evidence of conspiracy to violate their civil rights or any evidence of racial discrimination.

CONCLUSION

The Court has reviewed carefully the complaint and the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Court should grant the defendant summary judgment because, in response to the defendant's evidence, the plaintiffs have offered no evidence of any municipal policy or custom which violated their civil rights. Additionally, the plaintiffs have not provided any evidence of denial of due process to support their claim in Count I and have not provided any evidence of racial discrimination to support their claim in Count II.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Jose A. Gonzalez, United States District Judge. Failure to file objections timely shall bar the parties

from attacking on appeal factual findings contained herein. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (enbanc)

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 27th day of March, 1991

UNITED STATES MAGISTRATE JUDGE

LURANA S. SNOW

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. CASE NO. 89-14174

CITY OF STUART, BUILDING & ZONING DEPARTMENT CIV-GONZALEZ

Defendant.

ORDER

THIS CAUSE has come before the Court upon the report and recommendation of the Honorable Lurana S. Snow, United States Magistrate Judge, dated March 27, 1991. The defendant had moved for summary judgment. Magistrate Judge Snow has recommendation the Court grant the defendant's motion. The plaintiffs have filed objections to Judge Snow's report.

Having reviewed, de novo, the Magistrate Judge's report of March 27, 1991, the plaintiffs' objections to the report, and the record, and being otherwise duly advised, it is hereby:

ORDERED and ADJUDGED that the above-mentioned order of the Magistrate Judge be ratified, affirmed, and made the Order of the District Court. The defendant's Motion for Summary Judg-

ment is GRANTED. The defendant shall file an order of final judgment for entry in this regard within twenty (20) days of the date of this order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 30th day of April, 1991.

JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

JANELLE COOK, et al.,

Plaintiffs,

v.

CASE NO. 89-14174

CIV-GONZALEZ

CITY OF STUART, FLORIDA

BUILDING AND ZONING DEPARTMENT,

Defendants.

FINAL JUDGMENT

In accordance with this Court's order granting the defendant's motion for summary judgment on all claims of the plaintiffs' complaint, it is hereby:

ORDERED and ADJUDGED that final judgment be and the same is hereby entered in favor of the defendant City of Stuart, Florida Building and Zoning Department and against the plaintiffs Janelle Cook and Ward Hall, Sr., the plaintiffs to take nothing and the defendants to go hence without durther day. The Court will retain jurisdiction over the litigants for the purpose of considering any post-judgment motions.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 20th day of May, 1991.

JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 10 1992
OFFICE OF THE CLERK

No. 92-693

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WARD G. HALL, SR.,

Petitioner,

v.

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPARTMENT,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court of Appeals' affirmance of the District Court's Final Summary Judgment departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

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28 U.S.C. §1254(1) 2

42 U.S.C. §1983 2

No. 92-693

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WARD G. HALL, SR.,

Petitioner,

v.

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPARTMENT,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals is not reported. The decision is reflected in Case No. 91-3426, Non-Argument Calendar, in the United States Court of Appeals for the Eleventh Circuit (App.3).

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1992 (App.1). The Petition for Writ of Certiorari was filed on September 21, 1992. The jurisdiction of this Court is invoked under *28 U.S.C. §1254(1)*.

STATEMENT

The Respondent objects to the Petitioner's Statement of the Case as incorrect, inaccurate and incomplete. Petitioner filed a two count "Amended Complaint" for damages (R.8). Each count was based on the alleged civil rights violations by the Respondent pursuant to *42 U.S.C. §1983*. Count I claimed the destruction of Petitioner's property without due process and Count II was based on allegations that the destruction of Petitioner's property was

racially motivated.

Petitioner, however, is not the owner of the property. [1]/ The record owner of the property is an Association which was never made a party to the proceedings in the District Court or in the appellate court. Petitioner is the mortgagee. The condemnation notices as well as the building permit set forth information relative to time limits, appeals, demolition and liens. The Petitioner personally saw the condemnation notice which prompted him to seek the building permit, and personally applied for and received the building permit on behalf of the owner-Association. The City followed its own Code provisions and ordinances governing unsafe buildings. The Magistrate Judge's report specifically found that the Petitioner

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[1]/ The factual statements in this paragraph are taken directly from the Magistrate Judge's twenty-eight page Report and Recommendations (App.14).

made no claim of any special disability (such as a lack of fluency in English) which would give rise to any issue as to the adequacy of the "notice" (App.14).

Petitioner fails to state that police and photographic documents submitted to the appellate court through a "Motion to Supplement" had not been submitted to the District Court at the time the motion for summary judgment was pending. [2]/ The motion to supplement was denied by order of the Eleventh Circuit Court of Appeals on June 23, 1992 (App.7).

The Petitioner incorrectly states that the issue of racial discrimination was not addressed by the District Court in its Final Summary Judgment. The Magistrate Judge specifically recommended that the District

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[2]/ The documents were listed on the pre-trial catalog and were intended to be used at trial (R.36) but were never submitted to the District Court.

Court "should grant the [respondent's] motion for summary judgment on Count II because the [petitioners'] have not provided any evidence of conspiracy to violate their civil rights or any evidence of racial discrimination." The District Court reviewed the Magistrate Judge's report, *de novo*, together with the Petitioner's objections to the report, and the record, before making the Magistrate's findings and recommendations an order of the District Court (App.12). The Eleventh Circuit panel specifically reviewed whether or not there was any evidence of a racially motivated conspiracy. The Eleventh Circuit found that the "plaintiffs have entirely failed to identify any evidence in the record that would indicate genuine issues for trial. Because plaintiffs had no facts suggesting that they were treated differently than other, similarly-situated property owners in the City, the district court correctly ruled

that the City was entitled to judgment as a matter of law (App.3)."

ARGUMENT

I. THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S FINAL SUMMARY JUDGMENT IS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO REQUIRE THIS COURT'S POWER OF SUPERVISION

Petitioner argues that the actions of the Respondent were inadequate to assure Petitioner "procedural due process" before the demolition of the property upon which he holds a mortgage. Petitioner's argument, however, as well as his cause of action, is that he did not specifically receive the notice and information mailed by the Respondent City. Petitioner contends that the record contained sufficient factual conflicts as to whether or not he received notice to have successfully avoided a final

summary judgment.

The second part of Petitioner's argument relates to the issues of racial discrimination. Petitioner contends that his exhibits contained sufficient inferences to carry his burden of proof that the Respondent engaged in a conspiracy to destroy Petitioner's property because of Petitioner's race.

Both these contentions raise no issues warranting review by this Court.

There is no conflict in the law and its application relied upon by the Petitioner and the law relied upon by the District Court in granting Respondent's motion for final summary judgment or the law relied upon by the Eleventh Circuit Court of Appeal in affirming the final summary judgment.

The District Court referred Respondent's Motion for Summary Judgment to the Magistrate Judge pursuant to *28 U.S.C. §636(b)(1)(B) (App.8)*.

The Magistrate Judge found, not only that the Petitioner had not plead the necessary elements for a civil rights claim against Respondent, *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), but had failed to produce any proofs or provide any evidence of a municipal policy of condemnation and demolition of property without notice and for racial motives. The Magistrate Judge also considered the "due process" claim and factually determined that Respondent's established procedure for condemnation and demolition of property satisfied the requires of *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) (App.14). After a complete review of the record, the District Court entered an order (App.12) affirming the findings and recommendations of the Magistrate Judge and entered a Final Summary Judgment (App.10).

On appeal to the Eleventh Circuit, the decisional panel again reviewed the record in light of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and based on the established law of *Monell v. Department of Social Services*, 436 U.S. 658, 98 s.Ct. 2018, 56 L.Ed.2d 611 (1978), determined that Petitioner failed "to identify any evidence in the record that would indicate genuine issues for trial." (App.3)

Respondent, CITY OF STUART, respectfully contends that there was no departure from the accepted and usual course of proceedings by the District Court in granting Respondent's motion for final summary judgment or by the Eleventh Circuit Court of Appeals in affirming the final summary judgment that would require review by this Court.

♦

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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♦

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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 91-5426
Non-Argument Calendar

D. C. Docket No. 89-14174-CIV-JAG

JANELLE C. COOK,
WARD G. HALL,

Plaintiffs-Appellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPT.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before EDMONDSON, COX and BIRCH, Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 23, 1992
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: JUL 15 1992

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5426
Non-Argument Calendar

D. C. Docket No. 89-14174-CIV-JAG

JANELLE C. COOK,
WARD G. HALL,

Plaintiffs-Appellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPT.,

Defendant-Appellee.

Appeal from the United States District Court
Southern District of Florida

(June 23, 1992)

Before EDMONDSON, COX and BIRCH, Circuit Judges.

PER CURIAM:

In this appeal, the plaintiffs, challenge the district court's grant of summary judgment in favor of defendant City of Stuart, Florida, Building and Zoning Department ("City"). In their complaint the plaintiffs alleged that the City violated 42 U.S.C. § 1983 (1988) by discriminating against them on the basis of their race. Count one of the complaint alleged that the City engaged in racial discrimination when it purportedly destroyed the plaintiffs' building without proper notice. Count two contented that unnamed City conspirators engaged in a racially motivated plan to deprive the plaintiffs of their property

rights. After full discovery and the assistance of a magistrate judge, the district court granted summary judgment to the City because the plaintiffs had provided no evidence of a discriminatory City custom or policy and no evidence of a racially motivated conspiracy. We **AFFIRM.**

The City clearly met its Fed. R. Civ. P. 56 burden of showing that the plaintiffs lacked any evidence in support of their case. Upon this showing, the plaintiffs were required to demonstrate specific facts that indicated genuine issues for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986); Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990). The plaintiffs failed to meet this burden. The plaintiffs, have not identified any evidence of a discriminatory City custom or policy, as required to hold a municipality

liable for section 1983 violations. See Monell v. Dep't of Social Servs., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56-L.Ed.2d 611 (1978). Indeed, the plaintiffs' amended complaint does not even allege that such customs or policies exist. Nor have the plaintiffs designated any evidence in support of their claim that there was a racially motivated City conspiracy. The plaintiffs' reliance upon bare allegations and unsubstantiated rhetoric is insufficient at the summary judgment stage. See Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986).

The plaintiffs have entirely failed to identify any evidence in the record that would indicate genuine issues for trial. Because the plaintiffs had no facts suggesting that they were treated differently than other, similarly-situated property owners in the City, the district court correctly ruled that

the City was entitled to judgment as a matter of law.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5426

JANELLE C. COOK,
WARD G. HALL,

Plaintiffs-Appellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPT.,

Defendant-Appellee.

On Appeal from the United States District Court for
the Southern District of Florida

O R D E R:

Appellants' motion to supplement the record with police and photographic documents is DENIED.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. CASE NO.89-14174-CIV-GONZALEZ

CITY OF STUART, FLORIDA
BUILDING AND ZONING DEPARTMENT,

Defendant.

ORDER OF REFERRAL TO UNITED STATES MAGISTRATE

THIS CAUSE has come before the Court upon the defendant's motion for summary judgment.

The Court has reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that pursuant to 28 U.S.C. §636(b)(1)(B) the defendant's motion is referred to United States Magistrate Judge

Lurana S. Snow for further proceedings, including report and recommendation concerning the disposition of the motion.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 31st day of January, 1991.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Hon Lurana S. Snow
Kenneth P. Carman, Esq.
Janelle Cook

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. CASE NO.89-14174-CIV-GONZALEZ

CITY OF STUART, FLORIDA
BUILDING AND ZONING DEPARTMENT,

Defendant.

FINAL JUDGMENT

In accordance with this Court's order granting defendant's motion for summary judgment on all claims of the plaintiffs' complaint, it is hereby:

ORDERED and ADJUDGED that final judgment be and the same is hereby entered in favor of the defendant City of Stuart, Florida Building and Zoning Department and against the plaintiffs Janelle Cook and Ward Hall, Sr.,

the plaintiffs to take nothing and the defendants to go hence without further day. The Court will retain jurisdiction over litigants for the purpose of considering any post-judgment motions.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 20th day of May, 1991.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Kenneth Carman, Esq.
Janelle Cook
Ward Hall, Sr.

FINAL ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. CASE NO. 89-14174-CIV-GONZALEZ

CITY OF STUART, BUILDING & ZONING DEPARTMENT,

Plaintiff.

ORDER

THIS CAUSE has come before the Court upon the report and recommendation of the Honorable Lurana S. Snow, United States Magistrate Judge, dated March 27, 1991. The defendant had moved for summary judgment. Magistrate Judge Snow has recommended the Court grant the defendant's motion. The plaintiffs have filed objections to Judge Snow's report.

Having reviewed, de novo, the Magistrate

Judge's report of March 27, 1991, the plaintiffs' objections to the report, and the record, and being otherwise duly advised, it is hereby:

ORDERED and ADJUDGED that the above-mentioned order of the Magistrate Judge be ratified, affirmed, and made the Order of the District Court. The defendant's Motion for Summary Judgment is **GRANTED**. The defendant shall file and order of final judgment for entry in this regard within twenty (20) days of the date of this order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 30th day of April, 1991.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Lurana S. Snow
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-14174-Civ-GONZALEZ

JANELLE C. COOK, et a., :

Plaintiffs, :

vs. :

CITY OF STUART, BUILDING AND ZONING DEPARTMENT, :

Defendant. :

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the defendant's motion for summary judgment and was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

PROCEDURAL HISTORY

The pro se civil rights complaint against the City of Stuart, Florida Building and Zoning Department was filed November 1, 1989

(Docket Entry 1). After dismissal of the complaint for lack of proper service (Docket Entry 7), an amended complaint was filed March 30, 1990 (Docket Entry 8). The answer was filed May 3, 1990 (Docket Entry 11).

The Defendant filed the motion for summary judgment on November 2, 1990 (Docket Entry 28); the plaintiffs' response was filed November 29, 1990 (Docket Entry 30).

FACTS ALLEGED

The amended complaint (hereinafter "complaint") alleges that on September 12, 1989, the defendant entered onto private property, demolished the building situated thereon and cleared the land without notice to the plaintiffs, who own the property. The plaintiffs state they received no written or verbal notice that the property was being condemned before a condemnation notice was posted on the property. The plaintiffs saw

the notice on November 3, 1988, and immediately met with a code enforcement officer, O'Neil, to discuss the condemnation. The complaint alleged O'Neil stated that he had mailed a notice but it had been returned as undelivered. The plaintiffs supplied an updated address.

At the meeting, they explained that the property was the subject of a lawsuit in state court, but the plaintiffs would repair the structure to conform to the relevant codes. O'Neil agreed to permit the repairs and suggested the plaintiffs keep the condemnation notice posted on the property to help prevent trespassing.

The repairs were begun, but the house was subsequently demolished without notice to the plaintiffs, the mortgage holder, or the Hedge Highway Evangelistic Association, Inc. (hereinafter "the Association," the owner of

record of the property.)

Count I asserts a violation of the plaintiffs' civil rights pursuant to 42 U.S.C. §1983, owing to the destruction of the property without proper notice.

Count II alleges violation of the plaintiffs' civil rights pursuant to 42 U.S.C. §1983, owing to a racially motivated conspiracy to effect the malicious or negligent destruction of a boarding house.

The plaintiffs request compensatory damages and damages for emotion distress.

MOTION FOR SUMMARY JUDGMENT

The defendant's motion for summary judgment contends that the plaintiffs have no standing to file a lawsuit regarding the property; that they have named an improper defendant; that property rights involving pecuniary loss cannot form the basis for a civil rights action; that the matter is not

ripe for federal review because the plaintiffs have failed t exhaust their state law remedies; that there is no showing that the incident was the result of established municipal policy or custom; that the necessary due process was afforded the plaintiffs, and that there is no evidence of racial discrimination.

In support of these arguments, the defendant filed O'Neil's deposition and several exhibits.

During the deposition, O'Neil stated that when he first saw the premises, the doors were open, the plumbing had been vandalized, the wiring was faulty, windows were broken, and part of the floor was missing (p. 37). Although he was in the neighborhood to inspect another property, the condition of the plaintiffs' property mandated an inspection

(pp. 36-37).

O'Neil testified that a notice of condemnation had been mailed to the Association; O'Neil received a signed return receipt dated November 4, 1988 (p. 7; see also Exhibit 1). O'Neil did not know what record had provided the address to which the notice was mailed (2239 Flamingo Terrace, Jensen Beach, FL 33457)(p.16, and defendant's Exhibit 1).

O'Neil testified that the City regulations did not require separate notice of demolition and that the plaintiffs had notice of the condemnation when they came to his office on October 3, 1988 (p. 31).

O'Neil also testified that a title search had been made prior to the demolition of the building but he was not aware of a mortgage holder. O'Neil believed that notice of the

demolition was mailed on May 24, 1989, to the owner listed on the tax roll and also was inserted in the newspaper, but he did not personally do either, and had no record of those notices (pp. 11-12). He remembered that the mailed noticed of demolition was returned undelivered (p.31).

There was no attempt made to obtain the address of the Association from the Secretary of State (p. 15). Defendant's Exhibit III is an affidavit from a title search company stating that the property was deeded to the Association by a quitclaim deed filed February 19, 1985.

O'Neil stated that during the November 3, 1988, meeting the plaintiffs submitted an application for a building permit for repairs to the property (p. 34). The permit was issued the same day (p. 35) in the name of the Association, although the plaintiffs requested

a permit in the name of plaintiff Cook, a bishop in the church (p. 34). The address of the Association listed on the permit was 5755 Southeast Green Lane, Stuart, Florida (p. 35).

The building permit had a time limit of six months if there was no active work performed, and was valid for the length of construction if the work was ongoing (p. 19). Prior to the September 1989 demolition, O'Neil observed that the doors again were open, the plumbing disconnected, the flooring removed, and the wiring unchanged. Bars had been added to some of the windows, but the building contained clothing, trash and food debris (p. 41).

The demolition decision was made by O'Neil and another employee of the Building Department, Mr. Kearney. A second notice of condemnation was posted on the property prior to the demolition (p. 45).

Exhibit I is a copy of a condemnation notice for the subject property, dated November 1, 1988, which lists the owner as the Association, with a Jensen Beach address. The notice is a form which lists various deficiencies; all are checked off for this property:

> Property unsecured and readily available to trespassers.
>
> Plumbing and plumbing fixtures, including bathroom facilities, sinks and running water.
>
> Electricity and electrical fixtures.
>
> Heat and ventilation.
>
> Rodent-proofing and water-tightness.
>
> Foundations.
>
> Walls, windows.
>
> Doors and door frames.
>
> Roof.
>
> Stairways and porches.

The notice also states that the owner has 30 days to botain a building permit and begin

renovation, or may appeal the condemnation within 10 days. If the condemnation is not resolved in 60 days, the City of Stuart will demolish the building and assess the expense as a lien against the property. The notice is signed by O'Neil.

Exhibit II is the City Manager's affidavit stating that the City of Stuart is the only entity capable of being sued, there is no separate entity known as the City of Stuart, Florida, Building and Code Enforcement. The affidavit also states that condemnations are performed in accord with the City's ordinances; there is no custom or policy to the contrary which allows condemnation without notice or for racially discriminatory reasons.

The Stuart City Charter §11 states that the City of Stuart is governed as provided in the charter; the governing body is the City

Commission (Exhibit IV).

Exhibit V is a coy of article XV of the Stuart Code governing unsafe buildings. Section 6-512 requires delivery of written notice of an unsafe building to the owner and the tenant or other person in possession, the mortgagee and the other persons or entities having an interest in the property. Their addresses shall be obtained from the latest tax records; a title certificate also shall be ordered. If these individuals cannot be found on the premises after reasonable search or inquiry, notice of the unsafe building may be posted on the property and also published in the newspaper as provided. The notice must also inform the owner of the right to appeal.

Section 6-514 provides that 60 days after the notice is posted or served, if there is no appeal and if the owner has failed to take such steps as to render the building no longer

unsafe, the building official shall make such report to the City Manager. Thereafter the City Manager decides if the building should be demolished, remain vacant or be secured, and takes steps to enforce the decision. Section 6-515. [The Court notes that there is no requirement that the City Manager provide any notice to owners or others of his decision.] The total costs of the demolition and the steps leading thereto are then assessed as a lien against the property. Section 6-516.

Exhibit VI is an affidavit from City Commissioner Christie, which states that the City Commission has enacted ordinances regarding the condemnation of unsafe and unsecured property. There is no policy or custom allowing condemnation of property without notice to the legal owners; in no instance has that occurred. Additionally, condemnations are not instituted based on race

and no such policy or custom has been authorized. Christie stated that as a black member of the City Commission he is particularly sensitive to the needs of black constituents.

Exhibits VII through x are the affidavits of City Commissioners Jefferson, Krauskopf - who is also Mayor, Arnold and Walson. These affidavits repeat Christie's statements that condemnations are not instituted without notice or on the basis of race; the City Code governs and there is no policy or custom to the contrary.

The plaintiffs responded to the motion for summary judgment with a number of exhibits. In support of their naming the City of Stuart Building and Code Enforcement Board as the defendant, the plaintiffs supply a copy of the City of Stuart, Building and Code Enforcement listing in the telephone book

(Docket Entry 30, Exhibit B).

In support of their standing as plaintiffs, they have provided a copy of plaintiff Cook's December 1985 final judgment of dissolution of marriage which voided the February 18, 1985, quitclaim to the Association and awarded Cook exclusive possession of the property (Exhibit C, p. 4 paras. 4 and 6(d)).

The plaintiffs also provided a February 11, 1985, mortgage deed on the property in favor of plaintiff Hall signed by plaintiff Cook (Exhibit D). The incorporated interest-free note is repayable as a lump sum on December 31, 1993 and is secured by the mortgage. The mortgage gives the mortgagee power to foreclose on the property if the underlying note or any other sum related to the property, such as taxes, is not paid. The mortgage bears a State of Florida documentary

stamp dated February 12, 1985, and is recorded in the Martin County records in Book 627, pages 691-94. This mortgage was also voided by the final judgment of divorce (Exhibit C, p. 4, para. 3)

However, Florida's Fourth District Court of Appeal ruled that Cook's ex-husband had no standing to ask the circuit court to void the quitclaim deed and the mortgage deed, and specifically found that the trial court could not affect the Association's title or Hall's mortgage since neither the Association nor Hall was a party to the divorce proceedings. On October 9, 1987, the court of appeal reversed those sections of the final judgment (Exhibit E).

Regarding the matter of notice, the plaintiffs offered a November 11, 1990, statement from the Jensen Beach Post Office: "There is no record on file @ the Jensen Beach

Post Office of article #P659683669 Being Received - Regular Forward had expired @2239 SE Flamingo Terrace - Undeliverable as addressed /s/ KR Flaum Sr." (Exhibit F). On July 31, 1987, Hall applied for a Post Office box in Jensen Beach (Exhibit G), after the property at 2239 Southeast Flamingo Terrace was seized by the Sheriff on a writ of possession (Exhibit H).

A 1989 proposed tax bill for the subject property shows the owner as Hedge Highway Evangelistic Association, 5755 SE Green Lane, Stuart FL 34997 (Exhibits J, J-1). The November 3, 1988, application for a building permit lists the owner as the Association, 5755 SE Green Lane, Stuart, FL 34997, signed by Bishop Hall for the Association (Exhibit K). The permit states that permit applications for proposed work shall be considered abandoned six moths after the date of filing.

Exhibit L is a July 1989 letter from the Florida Department of State which states that the Association, at the Stuart address, has certificate of status number 730690.

A computer print out from the Stuart Police shows a call to the premises August 31, 1989 at 1312 hours (Exhibit M).

A receipt dated April 1, 1988, indicates that Mrs. Cook paid a painting contractor $555 to clean four properties, including subject property (Exhibit Q). Eight window grates were paid for on November 10, 1988 (Exhibit R).

Exhibit I is a copy of a hand-dated sender's portion of a certified mail number allegedly attached to a notice of condemnation sent to the owners of another property in Stuart, the Woodman Hall Building. The plaintiffs contend that since there is no return receipt on file for this condemnation

notice, there is a policy of not mailing notices. They assert that the signed return receipt on file for their property is suspicious. Additionally, the memorandum of law alleges that the Woodman Hall Building had not been demolished as of November 1990, even though the condemnation notice is dated July 10, 1989. They argue that the rapid demolition of their property was obviously racially-motivated.

Plaintiff Cook's affidavit (Exhibit S) states that she is the owner of the subject property by virtue of the December 1985 final judgment of dissolution of marriage and the reversal of the judgment by the Fourth District Court of Appeal. The property first belonged to her late father. Cook avers she holds one of two interests in the property.

The affidavit states that Cook was present at the November 3, 1988, meeting with

plaintiff Hall and O'Neil. At that meeting O'Neil did not provide any written guidelines for making the building conform to the code, did not show them the condemnation notice, did not tell them of the right to appeal, and did not mention demolition. Cook also avers that O'Neil stated that the mailed notice of November 1988 had been returned undelivered.

The affidavit continues that O'Neil refused to accept Cook's assertion that the property belonged to her and that she intended to change the deed to show the property was no longer owned by the Association. O'Neil insisted that the permit be issued to the Association to expedite matters, since the notice of condemnation was issued in that name. O'Neil also stated that the building was structurally sound.

Cook states that plaintiff Hall moved from Jensen Beach in July 1987.

Plaintiff Hall's affidavit (Exhibit T) states he is the mortgagee of the property and one of the two parties of interest in this action. Hall, as Bishop of the Association, states that the property no longer belongs to the Association by virtue of the December 1985 final judgment of dissolution of marriage.

Hall avers that at the November 3, 1988, meeting with O'Neil, the plaintiffs told O'Neil the deed to the property would be changed once the divorce litigation was over. However, O'Neil insisted on issuing the building permit in the Association's name since that name was on the notice of condemnation. O'Neil also suggested that the "condemned" sign remain posted on the property to discourage trespassing.

The affidavit states that O'Neil never gave the plaintiffs any condemnation notice during meeting, did not offer any written

guidelines for the repairs, did not inform the plaintiffs of the appeal process, or give notice of the September 1989 demolition. However, O'Neil did state that the building was structurally strong, would not take much work to meet the code, and would help ease the housing shortage in east Stuart.

Hall continues by stating that he changed the Jensen Beach address for the Association in July 1987; mail sent to that address after July 1988 would have been returned undelivered.

Hall has never been shown the actual return receipt card, in spite of requests to produce it (Exhibits N and O). The copy he was shown at O'Neil's deposition had several numbers cut off at the edge of the paper and is not the copy attached to the defendant's motion for summary judgment.

Finally, Hall states that he has

photographs of properties belonging to others in Stuart, such as Woodman Hall, which demonstrate that the plaintiffs are victims of racial discrimination.

RECOMMENDATIONS OF LAW

Title 42 U.S.C. §1983 establishes the right of a person to pursue a civil action based on deprivation of federally protected rights. The two essential elements to a §1983 action are: (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct must have deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). The evidence must be viewed in the light most favorable to the non-moving party. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

1. Capacity To Be Sued

The defendant contends that the only proper defendant to this action is the City of Stuart, a municipal corporation, which has been named as a defendant. The named defendant City of Stuart, Florida Building and Code Enforcement, claims it is not an entity capable of being sued.

Pursuant to Rule 17(b), Fed.R.Civ.P., the capacity of a corporate entity to be sued is determined by state law. In Florida a municipal corporation's capacity to sue and be

sued is governed by the Municipal Home Rule Powers Act, which provides municipalities with "the broad exercise of home rule powers granted by the constitution." Fla.Stat. §166.021. The Florida Constitution permits the exercise of "any power for municipal purposes except as otherwise provided by law." Fla.Constitution, Art. 8, §2(b).

Florida courts interpret this grant to mean that "[a]utonomous bodies of government have the power to either bring suit or be sued." Miami v. Rodriguez-Quesada court found that non-autonomous city boards did not have the capacity to sue or be sued.

The defendant provided the affidavit of the City Manager which avers that the only governmental entity is the City of Stuart; there is no separate entity known as the City of Stuart, Florida Building and Code Enforcement. All building and code

enforcement functions are performed by City of Stuart employees.

The plaintiffs provided the telephone listing for City of Stuart, Code Enforcement Board. However, a telephone directory listing does not define or affect the governmental entity properly created pursuant to Florida statutes. The listing clearly is meant to help citizens direct their inquires to the proper city employee.

The evidence is unrefuted that the only proper defendant is the City of Stuart.

However, prior to the motion for summary judgment, the defendant filed a motion to quash service, an answer, witness lists and various motions in the name of the City of Stuart Code Enforcement Board. Neither of the first two pleadings assert that the complaint or the amended complaint names a defendant which lacks the capacity to be sued. The

argument does not arise from evidence obtained during discovery; it is now asserted a year after the action was initiated, after a trial date has been set.

Rule 9(a), Fed.R.Civ.P., requires a party wishing to raise the defense of the capacity of an entity to be sued shall file "a specific negative averment." The Court must consider whether the defense of lack of capacity is waived if not asserted at the outset of the lawsuit. This analysis requires a determination of the nature of the defense according to state law, and then ascertaining when it must be raised under the Federal Rules of Civil Procedure. Morgan Guaranty Trust Co. v. Blum, 649 F.2d 342, 345 (5th Cir. 1981) (the Eleventh Circuit adopted as precedent the rulings of the Fifth Circuit decided prior to September 30, 1981. Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981)).

Fla.R.Civ.P.1.120(a) also provides that the defense of lack of capacity to be sued must be made by specific negative averment. In Florida courts, the defense must be raised in the answer or a motion to dismiss. Keehn v. Joseph C. Mackey & Co., 420 So.2d 398, 399, n. 1 (Fla. 4th DCA 1982), citing Whittington Condominium Apts. Inc. v. Braemer Corp., 313 So.2d 463 (Fla. 4th DCA 1975).

Federal Rule 9(a) requires the same procedure. In this Circuit, lack of capacity to be sued may be waived if not appropriately raised in a responsive pleading. Morgan, supra, 649 F.2d at 345, citing 5 Wright and Miller, Federal Practice and Procedure, §1295 (1965).

Accordingly, the Court should deny the defendant's motion for summary judgment based on lack of capacity to be sued.

2. Real Parties In Interest

The defendant contends only the owner of record for real property can file a lawsuit regarding the destruction of that property. The October 16, 1990, affidavit from the Palm Beach Title Service states that the owner of record of the property is the Hedge Highway Evangelistic Association, Inc. The affidavit does not mention any recorded mortgage.

Plaintiff Cook claims to be the owner of the property and plaintiff Hall claims to be the mortgagee of the property.

The owner of the property has standing to file a lawsuit in federal court. Walker v. United States, 428 F.2d 1229, 1233 (C. Cl. 1970). The plaintiffs' exhibits show that on February 18, 1985, plaintiff Cook conveyed the property by quitclaim deed to the Association. The quitclaim deed was voided by the final judgment of divorce issued December 10, 1985,

and plaintiff Cook was awarded exclusive possession of that property. On October 9, 1987, the Fourth District Court of Appeals reversed the judgment insofar as it set aside the quitclaim deed. The quitclaim deed was restored to full effect; the property reverted to ownership by the Association. The plaintiffs' and defendant's evidence shows Cook has no individual ownership interest in the property.

The Court notes that Cook is a Bishop in the Association, but nothing in the complaint or exhibits suggests that Cook is suing on behalf of the Association. Moreover, the current complaint is filed pro se; the Association must be represented by an attorney in district court. Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985), cert. denied, 474 U.S. 1058 (1986).

Accordingly, Cook has no interest in the

property, either as an individual owner or as an agent of the corporation, and cannot be a plaintiff in this action.

Next, the Court will consider Hall's standing. A mortgagee has an interest in real property and may file a lawsuit to recover damages for destruction of the property. Allstate Finance Corp. v. Zimmerman, 272 F.2d 323, 325 (5th Cir. 1959), citing Atlantic Coast Line Railway Co. v. Rutledge, 165 So.2d 563 (Fla. 1935).

On February 11, 1985, before the property was quitclaimed to the Association, Cook signed a note and mortgage on the property which named Hall as the mortgagee. The mortgage was recorded in the record books of Martin County on February 12, 1985. Although the final judgment of divorce voided the mortgage, the court of appeal reversed that part of the judgment, thereby reinstating the

mortgage. The defendant provided no evidence challenging the recorded mortgage.

Because Hall, as mortgagee, has a legally enforceable interest in the property, the Court should not grant the defendant's motion for summary judgment based upon lack of a real party in interest.

3. No Showing Of Municipal Custom Or Policy

Municipal liability can be asserted if the plaintiffs demonstrate that the injury was caused by the official custom or practice of municipality. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). An isolated improper act by a municipal employee does not demonstrate municipal custom or policy as required by Monell, unless the single act is the product of an existing unconstitutional policy. Oklahoma City v. Tuttle, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436 (1985).

Municipal policy may be created by the

act of the legislative body, by widespread practice so permanent and well-settled as to constitute a custom, or by an official with the authority to make final decision for the municipality. Bannum v. Fort Lauderdale, 901 F.2d 989 (11th Cir. 1990).

The amended complaint does not allege a custom or policy of destruction of property without notice or for racial motives. Although the amended complaint contains a conclusory allegation of conspiracy, mere use of the word does not show policy or custom.

The defendant has provided a copy of the Stuart Code which states that condemnation may proceed only with notice to certain individuals or the posting of notice on the property. The factors to be considered in condemnation are listed in the regulations; the race of the owner is not among them. The affidavits of the City Commission members and

the City Manager state that condemnation is performed in accordance with the regulations; no other policy or custom is in effect. Property is not condemned without notice or for racial reasons.

O'Neil's deposition states that he issued the condemnation notice based on the condition of the structure. The deficiencies were listed on the condemnation notice. He avers that the plaintiffs had actual notice of the condemnation, since the sign posted on the property caused them to come to his office, where he showed them another copy of the notice and discussed the application for the building permit with them.

O'Neil also testified that in September 1989, few repairs had been made and demolition was scheduled. Notice of demolition is not required by the City code, but notice may have been sent to the owner of record, the

Association.

The plaintiffs offer their affidavits which state that they have photographs of the Woodman Hall Building and other proofs which demonstrate that the plaintiffs were the victims of racial discrimination. No photographs and no other proofs were submitted to the Court.

There is no issue of material fact regarding this issue; the plaintiffs have failed to allege facts or to provide evidence of a municipal policy of condemnation and demolition of property without notice and for racial motives. The defendant's motion for summary judgment should be granted since there is no showing that unconstitutional municipal policy caused the damage to the property.

4. Applicability of §1983 To Pecuniary Claims

Count I alleges the taking of property without due process. The defendant contends

that no property loss capable of measurement in monetary terms can form the basis for a civil rights action. However, civil rights law related to property rights is more complex than the defendant suggests in its memorandum.

A complaint which alleges the taking of property associated with realty without notice pursuant to established governmental procedures may state a civil rights violation even if there is a post-deprivation state law remedy. Evers v. Custer, 745 F.2d 1196, 1202, n. 6 (9th Cir. 1984). Established procedures may be found in city codes or in the decisions of the official with final authority in such matters. Burtnicks v. New York, 716 F.2d 982, 988 (2d Cir. 1983).

The defendant also contends that even if the plaintiffs may have a claim under the civil rights statute, the matter is not ripe for federal review because the plaintiffs

failed to exhaust their state remedies when they chose not to appeal the original condemnation in October 1988. The defendant cites Doody v. Tudor, 864 F.2d 1475 (9th Cir. 1989).

The Doody court, in an amended opinion, held that while a Fifth Amendment claim for taking of property without just compensation required exhaustion of state law remedies, a Fourteenth Amendment claim of taking property without due process was not similarly barred once the governmental entity had made a final decision to take the property. Sinaloa Lake Owners Ass'n. v. Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989). Accordingly, the Court should deny the defendant's motion for summary judgment on Count I for failure to state a civil rights claim ripe for federal review.

5. Due Process

The due process required before private

property can be demolished depends on the surrounding facts. The owner must have an opportunity to be heard before the destruction of property unless there is a strong governmental interest which mandates immediate action, such as an imminent, serious threat to public safety. Burtnicks, supra, 716 F.2d at 987; Lakeland v. Bunch, 239 So.2d 66 (Fla. 1974).

The defendant contends the plaintiffs received all the due process required by the Stuart Code, including notice and an opportunity to be heard. The notice was provided first by certified mail as evidenced by the signed return receipt and second by the November 3, 1988, meeting between the plaintiffs and O'Neil.

There is no issue of material fact that the plaintiffs had actual notice the property was condemned, even if they did not receive

mailed notice.

The Stuart Code provides two alternatives to the owner of condemned property who wishes to avoid demolition, either an appeal or an application for a building permit for necessary repairs. The plaintiffs applied for and received a building permit.

The Constitution does not require a building permit to extend indefinitely, particularly when the permit states that if work is abandoned for six months, the permit will expire. Spence v. Zimmerman, 873 F.2d 256, 260-61 (11th Cir. 1989). The instant building permit was issued October 3, 1988, and contained a six-month expiration warning. The plaintiffs' unrebutted evidence shows that nothing was doe to the property after the window bars were installed in November 1988, even though the property was still unsafe.

Although the plaintiffs obtained a building permit, they aver that they were never told of the right to appeal or the possibility of demolition; they contend they were deprived of due process.

Due process requires notice and a meaningful hearing. Sinaloa Lake Owners Ass'n, supra, 882 F.2d at 1405. The plaintiffs make no claim of special disability such as lack of fluency in English. Considering all the evidence before the Court, there is no issue of material fact that the plaintiffs had notice of the condemnation, conferred with the Building Department, and received a time-limited permit for repairs. Based on the last documented repair, the permit lapsed in May 1989, with the building still unsafe. The demolition occurred in September 1989.

There also is no issue of material fact

that the building had multiple code defects when condemned and when demolished. The plaintiffs do not claim that the building had no code violations and was improperly condemned.

Their only argument is that O'Neil did not warn them or notify them of the demolition. Separate notice of the demolition is not required by the Stuart Code, since demolition is only one step of the condemnation process. Clearly the plaintiffs had notice of that process, a chance to be heard and an opportunity to correct the code violations. The plaintiffs received all the due notice required by the Stuart Code and by the Constitution.

Therefore the Court should grant the defendant's motion for summary judgment on Count I because there is no showing of a lack of due process.

6. Racial Discrimination

Count II of the amended complaint alleges a racially-motivated conspiracy to destroy the property. At the summary judgment stage, the plaintiffs cannot rely on the bare allegations of conspiracy, but must provide evidence to support the claim. Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986). "To establish a prima facie case of conspiracy to violate rights protected by §1983, a plaintiff must demonstrate that the defendants 'reached an understanding to violate [his] rights.'" Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988)(citations omitted), reh. den., 860 F.2d 1092 (1988).

Nothing in the complaint or in the plaintiffs' response to the motion for summary judgment identifies the alleged co-conspirators or shows any evidence of express or implied agreement to violate the

plaintiffs' civil rights.

However, discriminatory acts may be performed in the absence of a conspiracy. Racial discrimination may be based on laws that are discriminatory on their face or are enforced in a discriminatory manner. Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944). It is undisputed that the condemnation regulation is not discriminatory on its face.

"The equal protection clause 'is essentially a direction that persons similarly situated should be treated alike.'" Spence, supra, 873 F.2d at 261 (citations omitted). During summary judgment, the plaintiffs must offer evidence that others similarly situated were treated more favorably. Id.

The plaintiffs' evidence of the treatment afforded other owners of condemned property consists of (1) a receipt for certified mail

to an addressee in Whitestone, New York; (2) a copy of the notice of condemnation sent to that same address regarding the Stuart property known as the Woodman Hall Building, showing code violations in six of the ten categories, and (3) Hall's affidavit stating he has photographs of the Woodman Hall Building which demonstrate that the plaintiffs are the victims of discrimination. The condemnation notice for the Woodman Hall Building was prepared July 10, 1989; during O'Neil's deposition on August 1, 1990, Hall suggests the building was still standing. The memorandum of law alleges the building was still standing in November 1990, but there is no evidence of this.

Nothing in this evidence indicates the race of the owners of the Woodman Hall Building, or that the buildings were similarly situated with respect to the building code

violations or what efforts were made to remedy those violations. The plaintiffs have failed to show discriminatory treatment.

Accordingly, the Court should grant the defendant's motion for summary judgment on Count II because the plaintiffs have not provided any evidence of conspiracy to violate their civil rights or any evidence of racial discrimination.

CONCLUSION

The Court has reviewed carefully the complaint and the applicable law, and being fully advised in the premiss, it is hereby

RECOMMENDED that the Court should grant the defendant's motion for summary judgment because, in response to the defendant's evidence, the plaintiffs have offered no evidence of any municipal policy or custom which violated their civil rights. Additionally, the plaintiffs have not provided

any evidence of denial of due process to support their claim in Count I and have not provided any evidence of racial discrimination to support their claim in Count II.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable Jose A. Gonzalez, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 27th day of March, 1991.

UNITED STATES MAGISTRATE JUDGE
LURANA S. SNOW

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